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**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA**

In re:

MARSH AVIATION COMPANY,

Debtor.

Chapter 11 Proceedings

Case No. 2:09-bk-23468-PHX-DPC

**RESPONSE AND LIMITED
OBJECTION TO MARSH
AVIATION COMPANY'S SECOND
AMENDED CHAPTER 11 PLAN OF
REORGANIZATION**

Date: December 2, 2014

Time: 2:30 p.m.

Place: Courtroom 603, 6th Floor
Phoenix, Arizona 85003

The Official Committee of Unsecured Creditors (the "Committee") in this case files its Response and Limited Objection to Confirmation of Marsh Aviation Company's Plan of Reorganization. The Committee's response is supported by the attached Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF FACTS AND BACKGROUND

Marsh Aviation Company ("Marsh Aviation") filed its petition under Chapter 11 on September 22, 2009. On June 14, 2011, this Court entered an Order Confirming Plan of Reorganization (the "First Confirmation Order"), confirming Marsh Aviation Company's First Amended Plan of Reorganization, with amendments incorporated into the First Confirmation Order (the "First Plan"). The First Plan became effective on

1 October 26, 2011, when Marsh Aviation certified that it had entered into the anticipated
2 contract with the Brazilian Navy (the “Brazilian Navy Contract”). Marsh Aviation was
3 unable to fulfil the Brazilian Navy Contract according to the terms of the First Plan.

4 Marsh Aviation filed its Second Amended Chapter 11 Plan of Reorganization on
5 November 10, 2014, wherein it proposed to perform certain aspects of the Brazilian Navy
6 Contract under different arrangements. Marsh Aviation has requested expedited
7 consideration in order to preserve available 2014 funding for the Brazilian Navy Contract.

8 **II. LEGAL ARGUMENT**

9 **A. Burden and Standard of Proof.**

10 As the proponent of a plan, the debtor has the burden of proving that each and every
11 element of 11 U.S.C. § 1129(a) has been satisfied. *In re Ambanc La Mesa L. P.*, 115 F.3d
12 650 (9th Cir. 1997). “The burden of proposing a plan that satisfies the requirements of the
13 Code always falls on the party proposing it, but it falls particularly heavily on the debtor in
14 possession or trustee since they stand in a fiduciary relationship to the estate’s creditors.”
15 *In re Perez*, 30 F.3d 1209, 1214 n.5 (9th Cir. 1994). A bankruptcy court may only confirm
16 a debtor’s plan if, in addition to other requirements, “the plan complies with the applicable
17 provision[s] of Title 11.” *Id.* at 1213 (9th Cir. 1994).

18 **B. Marsh Aviation Must Establish that the Plan is Feasible and Will** 19 **Lead to a Successful Reorganization.**

20 A condition to the confirmation of a plan is the finding that it is feasible under 11
21 U.S.C. § 1129(a)(11). The purpose of the feasibility test is to protect against visionary
22 or speculative plans. As noted by the Ninth Circuit:

23 The purpose of section 1129(a)(11) is to prevent confirmation
24 of visionary schemes which promise creditors and equity
25 security holders more under a proposed plan than the debtor
can possibly attain after confirmation.

26 *In re Pizza of Hawaii, Inc.*, 761 F.2d 1374, 1382 (9th Cir. 1985); 7 *Collier on*
27 *Bankruptcy* ¶ 1129.03[11] (15th Ed., rev. 2009).

28 Feasibility contemplates “the probability of actual performance of the provisions

1 of the plan.” *In re Hoffman*, 52 B.R. 212, 215 (Bankr. D. N.D. 1985). Factors to be
2 considered when judging feasibility of a Chapter 11 plan include the business’ earning
3 power, the sufficiency of the capital structure, economic conditions, managerial
4 efficiency, and whether the same management will continue to operate the company. *In*
5 *re Hoffman*, 52 B.R. at 215; *In re Great Northern Protective Services, Inc.*, 19 B.R. 802,
6 803 (Bankr. W.D. Wash. 1982).

7 “Where a debtor proposes to fund a plan out of operating revenue, its financial
8 record during the pendency of Chapter 11 is probative of feasibility (Citations omitted).
9 Income projections indicating financial progress must be based on concrete evidence of
10 financial progress, and must not be speculative, conjectural, or unrealistic predictions.
11 (Citations omitted).” *In re Merrimack Valley Oil Co., Inc.*, 32 B.R. 485 (Bankr. D.
12 Mass. 1983) *See In the Matter of Equity Funding Corporation of America*, 416 F. Supp.
13 132 (C.D. Cal. 1975); *In re Pizza of Hawaii, Inc.*, 761 F.2d 1374 (9th Cir. 1985).
14 Moreover, the longer the plan extends, the stricter the proof required as to feasibility and
15 adequate protection. *In re KRO Assocs.*, 4 B.C.D. 462 (Bankr. S.D. N.Y. 1978).

16 In this case, the reorganization depends on the successful performance of certain
17 aspects of the Brazilian Navy Contract. In support of feasibility, Marsh Aviation has
18 provided financial projections, which are attached as Exhibit B to Marsh Aviation’s
19 Disclosure Statement in Support of Marsh Aviation Company’s Second Amended
20 Chapter 11 Plan of Reorganization filed on November 10, 2014. However, no
21 information is provided supporting how these projections were derived.

22 Further information in this regard is needed. The Committee has been in contact
23 with the Marsh Aviation and is hopeful that it will obtain the necessary support for the
24 projections and other information prior to the hearing to consider confirmation of the Plan.

25 **C. Additional Protection is Required to Ensure Compliance with the Plan.**

26 Payments to unsecured creditors, which are to be paid in full under the Plan, are not
27 to start until 24 months after confirmation. In addition to any other reports and
28 requirements that may be imposed by the Bankruptcy Code, associated rules, court order

1 or the United States Trustee, Marsh Aviation should be required to provide reports to the
2 Committee, or any successor or designee, (the “Reports”) that include actual revenues,
3 expenses and other pertinent information as compared to the projections. The Committee
4 should be entitled to make reasonable verification of the Reports and conduct its own
5 investigations, with such efforts Marsh Aviation should cooperate, and, without limiting
6 the foregoing, arrange for an independent audit of Marsh Aviation, if there is reason to
7 conclude that there are material inaccuracies in the Reports, or the Reports are materially
8 incomplete, omit material information or are not timely provided. In addition and
9 independent of the requirement to provide Reports, Marsh Aviation should be required to
10 promptly disclose to the Committee any occurrences or events that may materially affect
11 the performance of or benefits to be provided under the Brazilian Navy Contract or the
12 ability of Marsh Aviation to perform under the Brazilian Navy Contract. These
13 requirements are necessary in order to ensure that Marsh Aviation can meet its obligations
14 both before and while quarterly payments are being made to unsecured creditors.

15 In addition, Marsh Aviation should be subject to reasonable limitations on certain
16 uses of cash, such as for equity distributions. Marsh Aviation also should be required to
17 make additional or accelerated payments to unsecured creditors, if cash reserves exceed
18 the amount necessary to fulfill legitimate business needs.

19 **D. Certain Provisions may Limit the Committee’s Ability to Seek the**
20 **Allowance of Professional Fees.**

21 The Plan provides for the allowance of “[c]laims for compensation for and
22 reimbursement of Jackson White, PC, Kelly G. Black, PLC and Sherman & Howard,
23 LLC arising after October 26, 2011, and allowed by the Court on application filed by the
24 effective date of this 2014 Plan.” The Plan provides that:

25 The effective date of this 2014 Second Amended Plan shall be the
26 date thirty (30) days after the entry of an Order confirming this
27 Chapter 11 Plan of Reorganization (and any amendments thereto)
28 or, at Debtor’s option, the effective date shall be such earlier date as
may be indicated in a Notice of Effective Date filed herein and
promptly noticed to all interested parties.

1 While the Committee does not object to Marsh Aviation electing an earlier effective
2 date, there is no reason to shorten to less than 30 days the ability to timely file an
3 application for compensation.

4 The Plan also appears to improperly limit further compensation to services
5 provided after October 26, 2011, which is the date the First Plan became effective. There
6 is no support for this limitation. The First Confirmation Order provides that:

7 IT IS FURTHER ORDERED that any claims for professional fees
8 incurred before entry of this Order, any other administrative claims,
9 and any other timely claims not previously filed, scheduled or
determined, shall be barred if not filed within thirty days after entry
of this Order;

10 Therefore, the applicable limitation should be June 14, 2011, which is the date the First
11 Confirmation Order was entered.

12 **E. The Scope of the Discharge is Excessive.**

13 Section 9.1 of the Plan, entitled “Effect of Confirmation,” provides:

14 Confirmation substitutes the terms and obligations stated in this
15 2014 Second Amended Plan for all preconfirmation claims and
16 interests and discharges the Debtor from any debt that arose before
confirmation of this Plan, subject to the occurrence of the effective
date.

17 The provision that “confirmation substitutes the terms and obligations stated in
18 this 2014 Second Amended Plan for all preconfirmation claims and interests” exceeds
19 the scope of the discharge provided under 11 U.S.C. § 1141(d) and may improperly
20 impair the rights of creditors, especially where a third party has guaranteed or also is
21 liable along with Marsh Aviation on an obligation.

22 **F. Confirmation of an Impaired Accepting Class, under 11 U.S.C.**
23 **§ 1129(a)(10).**

24 A plan may be confirmed only if “at least one class of claims that is impaired
25 under the plan has accepted the plan, determined without including any acceptance of
26 the plan by any insider.” 11 U.S.C. § 1129(a)(10). The Committee reserves the right to
27 examine the balloting and other information to confirm that Marsh Aviation has satisfied
28 the requirements of § 1129(a)(10).

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III. CONCLUSION

- A. Grant relief consistent with the foregoing;
- B. Alternatively, deny approval of the Plan; and
- C. Award other and further relief as the Court deems just and proper.

SHERMAN & HOWARD L.L.C.

/s/ Bryan A. Albue #009594